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No. 316

In the Supreme Court of the United States

OCTOBER TERM, 1958

WILL O. MURRELL, SR., PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

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On May 24, 1957, petitioner was adjudged guilty of contempt of court (R. 2) and fined $100 for contempt in the presence of the court by reason of his conduct while testifying as a defendant in a civil action. This adjudication was clearly one of criminal contempt and not to vindicate rights of the plaintiff in the civil action. While the order of contempt apparently bears the district court number of the civil case out of which the contempt action arose (cf. R. 2 and R. 19), it recites that the court, in its finding of contempt, was acting pursuant to and under the au-

thority of Rule 42(a) of the Federal Rules of Criminal Procedure (R. 1). Petitioner has proceeded, in his arguments for appellate review, on the assumption that the adjudication was one of criminal contempt (R. 3, 4, 14; Pet. 4-5).

The Court of Appeals dismissed an appeal by petitioner on March 19, 1958 (R. 10, 12). A petition for rehearing was denied on April 29, 1958 (R. 23). On June 30, 1958, petitioner applied to this Court for an extension of time within which to file a petition for a writ of certiorari. On July 1, 1958, Mr. Justice Black signed an order extending the time for filing the petition for a writ of certiorari to, and including August 28, 1958. The petition was filed on that day.

Petitioner had 30 days from April 29, 1958 within which to file his petition for a writ of certiorari or to apply for an extension of time. Rules 22(2) and 34(2) of the Rules of the Supreme Court; Rule 37(c) of the Federal Rules of Criminal Procedure. His application for extension presented on June 30, 1958, the 62nd day, was out of time and therefore the order of July 1, 1958 was ineffective to confer jurisdiction. See *Carleton Screw Products Co.* v. *Fleming*, 317 U.S. 634, discussed in Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (Revised by Wolfson and Kurland, 1951 ed.), Section 415, p. 829, fn. 4. See, also, *Overfield* v. *Pennroad Corp.* (order of Mr. Justice Burton vacating prior order of extension) discussed *ibid.*, Appendix B, p. 946, fn. 19.

It is therefore respectfully submitted that the petition for a writ of certiorari is out of time.

J. LEE RANKIN,
Solicitor General.

SEPTEMBER 1958.

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